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No. 94-1376

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ZARKO ILIC,

Petitioner,

v.

LIQUID AIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the unpublished court of appeals decision below that simply finds ample evidentiary support for factual findings that are not clearly erroneous and that the correct rules of law were applied by the trial court can be in conflict with another court of appeals decision when Petitioner has not cited such a court of appeals decision.

2. Whether this Court's power of supervision needs to be exercised when Petitioner has not shown any United States court of appeals departure or sanctioned United States district court departure from the accepted and usual course of judicial proceedings and Petitioner is objecting to the weight not given to his evidence or argument below.

LIST OF PARTIES

Zarko Ilic - Plaintiff/Petitioner

Liquid Air Corporation - Defendant/Respondent merged into Air Liquide America Corporation, a Delaware domestic corporation.

AL America Holdings, Inc.[1] - Parent of Defendant/Respondent, also a Delaware domestic corporation

[1]Both Air Liquide America Corporation and AL America Holdings, Inc. are privately held, with no shares issues to the public.

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Brown v. U.S., 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589, reh'g denied, 356 U.S. 948, 78 S. Ct. 776, 2 L. Ed. 2d 822 (1958) 10

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Rule Cited:

U.S. Supreme Court Rule 10.1(a) 2, 10

SUMMARY OF ARGUMENT

Petitioner has not provided any U.S. court of appeals decision from another circuit that conflicts with the decision below. Nor has the Petitioner shown misapplication of a prior decision of this Court by the courts below.

Petitioner incorrectly asks this Court to exercise its supervisory authority over the federal courts below where Petitioner's concern is over how his evidence and arguments were treated below.

ARGUMENT

REASONS FOR DENYING WRIT OF CERTIORARI

I. Petitioner Has Not Established A Conflict In U.S. Circuit Court of Appeals Decisions Or Misapplication Of A Prior Decision Of This Court.

U.S. Supreme Court Rule 10.1(a) provides that one reason for review on writ of certiorari is where the United States court of appeals decision is in conflict with a decision of another United States court of appeals on the same matter. This is a principal purpose for the Court's use of certiorari jurisdiction on issues of law. Braxton v. U.S., 500 U.S. 344, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385, 391 (1990).

Petitioner does not, however, provide any conflicting court of appeals decision on the same matter. The only case cited by Petitioner that was not an Eleventh Circuit case when decided is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970)[2], which holds that the statute of limitations for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) does not bar a later allegation of national origin discrimination in an amended charge which related back and grew out of the factual allegations in the timely sex discrimination charge.

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[2]When Sanchez was decided the Eleventh Circuit had not been established. The Eleventh Circuit has adopted and considered itself bound by all Fifth Circuit cases handed down prior to October 1, 1981. This includes Sanchez as law of the Eleventh Circuit. SEC v. Carriba Air, Inc., 681 F.2d 1318, 1324 n.7 (11th Cir. 1982).

The Sanchez court also held that a judicial complaint can contain allegations on matters developed in the EEOC's investigation of the charge. 431 F.2d at 466. Neither of these issues are present in this case. There is no conflict, even if Sanchez is considered to be a decision of another court of appeals.[3]

In the alleged conflict portion of the Petition, Petitioner argues an inconsistent application of Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984) (Petition, Reason II, page 8). Lewis is an Eleventh Circuit case and not a decision of another court of appeals. Petitioner also cites Lewis in his Question Presented No. 4, claiming that the district court failed to state what standard of proof was applied on the promotion issue. The U.S. Magistrate Judge, however, did state the applicable legal standard under decisions of this Court and that Plaintiff/Petitioner had the "burden of proving a prima facie case by a preponderance of the evidence." (Petition, Appendix E, page 9a)[4] The U.S. District Court adopted and confirmed the U.S. Magistrate Judge's Report and Recommendation (Petition, Appendix C).[5]

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[3]The underlying unpublished appellate decision does not state a principle of law with which there could actually be a conflict. (Petition, Appendix B, page 2a. A typographical error appears as "low" instead of "law" on page 3a.)

[4]Petitioner's Appendix E, page 9a, reflects footnote 1 in the U.S. Magistrate Judge's Report and Recommendation; however, the footnote and its text appear at page 23a.

[5]Typographical error in Appendix C, should read "law" instead of "low", page 4a.

Even if Lewis was a decision of another circuit, there is no conflict. Lewis rejected a "clear and convincing" standard in favor of a "preponderance" standard that was used here. Lewis, 731 F.2d at 1539. The Lewis court found liability and the remand was "for the fashioning of an appropriate remedy." Lewis, 731 F.2d at 1539, 1540. Petitioner's Question No. 4 does not present a reason for granting the writ.

Petitioner's Question No. 1 and Reason No. 1 For Granting Writ (Petition, pages ii, 4 and 5) claim the existence of an important and unanswered question and a conflict with a prior decision of this Court. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

Petitioner claims that "the District Court had erred in failing to apply 'disparate impact' analysis to his claims of discrimination in promotion." (Petition, page 5) Petitioner has a misconception of the law here. This Court decided that a "disparate impact analysis may in principal be applied to subjective as well as to objective practices" (emphasis supplied). Watson, 487 U.S. at 991, 108 S. Ct. at 2787, 101 L. Ed. 2d at 843. This is a permissive, not mandatory analysis.

In Watson, this Court also noted that it had "consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria." Watson, 487 U.S. at 988, 108 S. Ct. at 2785, 101 L. Ed. 2d at 841. Disparate treatment theory was applied here. (Petition, Appendix E, pages 8a-10a).

Petitioner's reliance on Watson is also misplaced in fact and law because he failed to "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for ... promotions because of their membership in a protected group." Watson, 487 U.S. at 994, 108 S. Ct. at 2789, 101 L. Ed. 2d at 845. This is not a class action case. Petitioner is concerned with the lack of his promotion. (Petition, pages 10-14). The U.S. Magistrate Judge found that he alleged discrimination against him "by not promoting him to two management level positions" (Petition, Appendix E, page 10a).

This Court in Watson acknowledged the legitimate relevance of subjective criteria for measuring an employee's qualities of "common sense, good judgment, originality, ambition, loyalty, and tact" and that evaluative opinions of managers are not susceptible to direct or objective measurement "for many jobs that involve close cooperation with one's co workers." Watson, 487 U.S. at 991, 108 S. Ct. at 2787, 101 L. Ed. 2d at 843. This relates to the employer's defense in a disparate impact case of business necessity and job relatedness for job requirements. Watson, 487 U.S.at 997, 108 S. Ct. at 2790, 101 L. Ed. 2d at 847.

The U.S. Magistrate Judge, in discussing the employer's promotion policy of promoting from within based on seniority if other facts are equal, concluded that "Given the attitude that Mr. Ilic had displayed, Liquid Air was well within its rights to decide that Ilic was not qualified to manage the plant and to chose Bostian and Thompson over Ilic." (Petition, Appendix E, page 14a).

Other findings by the U.S. Magistrate Judge on Petitioner's attitude in his Report and Recommendation include Petitioner's "repeated challenges to and confrontations with management and other employees regarding various aspects of plant operations" (Petition, Appendix E, page 11a); he manifested "an attitude that management could properly conclude made Ilic an unproductive employee requiring reprimands and discipline" (Petition, Appendix E, pages 12a and 13a); "made sarcastic responses to offered overtime" and that "management was well within its rights to conclude that this displayed an attitude not conducive to harmony and good production" (Petition, Appendix E, page 13a); and that his "challenges to authority were frequent and disruptive" (Petition, Appendix E, pages 15a and 16a).

Thus, even under this Court's Watson disparate impact analysis with the appropriate employer defense of manifest job relatedness requirements there were factual findings by the lower court that Petitioner was not deserving of promotion.

II. This Court's Supervisory Authority Over Lower Federal Courts Should Not Be Exercised When Petitioner Is Arguing Evidentiary Issues.

This case does not present a special and important reason for the Court's supervisory authority review because the Eleventh Circuit neither departed nor sanctioned District Court departure from the accepted and usual course of judicial proceedings.

Petitioner claims a departure in his Petition. Reason No. III, pages 10 - 14 of Petition. However, a reading of

that portion of the Petition shows that Petitioner is just rearguing the weight he feels that should have been given to his evidence and his arguments on that evidence. Petitioner disputes his lack of being promoted.

The writ should not be granted "merely to review the evidence or inferences drawn from it." General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178, 58 S. Ct. 849, 851, 82 L. Ed. 1273, 1275 (1938); adhered to 305 U.S. 124, 59 S. Ct. 116, 83 L. Ed. 81, reh'g denied, 305 U.S. 615, 59 S. Ct. 355, 83 L. Ed. 437 (1939).

This Court's certiorari jurisdiction should not be invoked to review evidentiary conflicts. N.L.R.B. v. Pittsburg Steamship Co., 340 U.S. 498, 503, 71 S. Ct. 453, 456, 95 L. Ed. 479, 482 (1951). Factual questions are for the trial court to resolve. J. I. Case Company v. Borak, 377 U.S. 426, 431, 84 S. Ct. 1555, 1559, 12 L. Ed. 2d 423, 427 (1964). See also Ferguson v. Moore-McCormick Lines, Inc., 352 U.S. 521, 528, 77 S. Ct. 459, 461, 1 L. Ed. 2d 515, 522 (1957), Frankfurter, J., dissenting (certiorari not proper when only thing in controversy is an appraisal of facts on which [the Supreme] Court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below.")

The Magistrate Judge concluded that, "Given the attitude that Mr. Ilic had displayed, Liquid Air was well within its rights to decide that Ilic was not qualified to manage the plant and to chose Bostian and Thompson over Ilic." (Petition, Appendix E, page 14a). The Magistrate Judge went on to find that, "Ilic has not proven that he was qualified for the promotions in question and thus has not established a prima facie case of discrimination with regard

to this failure to promote claim" (Petition, Appendix E, page 15a).

Petitioner's Questions Presented Numbers 2, 3 and 5 also raise evidentiary issues which are not for this Court to review on certiorari. General Talking Pictures Corp. v. Western Electric Co., supra.

Question No. 2 deals with Petitioner's completion of an EEOC questionnaire in which he admitted that he was "very outspoken" (Petition, page 6). This and other evidence supported the U.S. Magistrate Judge's conclusion of Petitioner's "...repeated challenges to and confrontations with management and other employees regarding various aspects of plant operations." (Petition, Appendix E, page 11a); that Petitioner "displayed an attitude not conducive to harmony and good production" (Id. at page 13a); that Petitioner's "challenges to authority were frequent and disruptive." (Id. at page 16a) Petitioner's reliance on Antonopulos v. Curojet-General Corp., 295 F. Supp. 1390 (E.D. Cal. 1968) is misplaced because that case dealt with equitable estoppel concerns at the motion to dismiss stage and timely filing of a charge by pro se plaintiffs. That issue is not in this case and Petitioner's self alleged errors were "corrected by EEOC in (his) official charge of discrimination" (Petition, page 6).

Nor is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) applicable to this case as it also dealt with reversal of an order dismissing a complaint for overly technical reasons when the U.S. District Court disallowed a relation back amendment to the charge.

Petitioner's Question No. 3 contains Petitioner's misunderstanding of what constitutes direct evidence of

discriminatory intent. There is no evidence that management acted or said it refused to promote, disciplined, or assigned overtime because Petitioner was Yugoslavian or he practiced the Eastern Orthodox religion which would have correlated to his complaint. See Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990).

Petitioner's cited authority in his Question No. 3 are Eleventh Circuit cases that do not reflect any conflict with other circuits, but go to the weight of his evidence which is not set forth in his Petition where these cases are cited (Petition, pages 7 and 8). The Eleventh Circuit denied rehearing and Petitioner's Suggestion of Rehearing En Banc (Petition, Appendix A, page 1a).

Petitioner's Question No. 5 raises Petitioner's allegations of fabricated memos and his argument references testimony by his two document expert witnesses (Petition, page 9) without inclusion of the documents or testimony, in Petitioner's Appendix. Had this been included it would further demonstrate Petitioner's efforts to have this Court review the evidence.[6]

Special and important reasons for this Court's review in the exercise of its supervisory power over the lower federal courts were found if a jury trial was denied. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 509, 77 S. Ct. 443, 450, 1 L. Ed. 2d 493, 501, reh'g denied, 353

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[6]Respondent has chosen not to append the documents or relevant trial testimony on this evidentiary issue because that would only compound the error of presenting this Court with evidentiary issues that were properly resolved at the trial stage, J. I. Case Company v. Borak, supra. This is not a basis for certiorari jurisdiction.

U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957). This power was also discussed on the issue of waiver of self-incrimination constitutional privilege in a civil case where criminal contempt was imposed. Brown v. U.S., 356 U.S. 148, 161, 78 S. Ct. 622, 630, 2 L. Ed. 2d 589, 600, J. Brennan, dissent, reh'g denied, 356 U.S. 948, 78 S. Ct. 776, 2 L. Ed. 2d 822 (1958). Failure to assess statutory issues before constitutional issues necessitated review in New York Transit Authority v. Beazer, 440 U.S. 568, 582, 99 S. Ct. 1355, 1364, 59 L. Ed. 2d 587, 600 (1979). Similar compelling reasons of constitutional significance for the grant of the writ do not exist here to justify review under Supreme Court Rule 10.1(a).

CONCLUSION

The petition for writ of certiorari should be denied because it fails to provide any basis[7] for United States Supreme Court review of the Eleventh Circuit decision below.

Respectfully submitted,

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[7]Petition has provided five questions and three reasons for review (Petition, pages i and ii) which Respondent has opposed and treated:

Petitioner Question	Respondent's Brief
No. 1	Page 4-6
No. 2	Page 8
No. 3	Page 8, 9
No. 4	Page 3, 4
No. 5	Page 9

Petitioner Reason	Respondent's Brief
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II	Page 3, 4
III	Page 6-8